02-809

JUL 18 2003

IN THE

Supreme Court of the United States

STATE OF MARYLAND,

Petitioner,

—v.—

JOSEPH JERMAINE PRINGLE,

Respondent.

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MARYLAND

BRIEF *AMICI CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE ACLU OF MARYLAND, AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, IN SUPPORT OF RESPONDENT

Tracey Maclin
Counsel of Record
Boston University School of Law
765 Commonwealth Avenue
Boston, Massachusetts 02215
(617) 353-4688

Steven R. Shapiro
American Civil Liberties Union Foundation
125 Broad Street
New York, New York 10004
(212) 549-2500

Lisa Kemler
Zwerling & Kemler, P.C.
108 North Alfred Street
Alexandria, Virginia 22314
(703) 684-8000

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....iii

INTEREST OF AMICI.....1

STATEMENT OF THE CASE.....1

SUMMARY OF ARGUMENT.....3

ARGUMENT.....5

I. INDIVIDUALIZED OR PARTICULARIZED SUSPICION IS AN ESSENTIAL ELEMENT OF PROBABLE CAUSE.....5

A. This Court's Precedents Establish That Particularized Suspicion is a Necessary Element of Probable cause.....7

1. Probable Cause to Arrest or Search Requires Particularized Suspicion Directed at the Target of the Intrusion.....8

II. THERE WAS NO PROBABLE CAUSE TO ARREST RESPONDENT ON THE FACTS OF THIS CASE.....16

A. The Discovery of Drugs Hidden Inside a Vehicle Does Not Provide Probable Cause to Arrest All of the Occupants.....19

B. Petitioner's Rule Extends Beyond Cars, and Would Effectively Overrule *Ybarra* and *Di Re*.....22

C. Rulings Since *Di Re* Have Not Undermined the Validity of *Di Re*; Rather, These Rulings Support the Conclusion That, Under the Facts, There Was No Probable Cause to Arrest Respondent.....27

CONCLUSION.....30

TABLE OF AUTHORITIES

Cases

Alabama v. Shelton, 535 U.S. 654 (2002) 29

Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936) 29

Atwater v. Lago Vista, 532 U.S. 318 (2001).....29

Beck v. Ohio, 379 U.S. 89 (1964).....26

Beckwith v. Philby, 108 Eng. Rep. 585 (1827).....7

Brinegar v. United States, 338 U.S. 160 (1949).....8, 9

Carroll v. United States, 267 U.S. 132 (1925) 8, 9

County Court of Ulster County v. Allen, 442 U.S. 140 (1979) 20, 27, 29

Ex parte Bollman, 8 U.S. (4 Cranch) 75 (1807).....7

Illinois v. Gates, 462 U.S. 213 (1983).....4, 9, 21

Illinois v. McArthur, 531 U.S. 326 (2001).....26

Johnson v. United States, 333 U.S. 10 (1948).....11, 12, 14

Mallory v. United States, 354 U.S. 449 (1957) 12

Ornelas v. United States, 517 U.S. 690 (1996) 21

Rohan v. Sawin, 59 Mass. (5 Cush.) 281 (1850) 7

Russell v. Shuster, 8 Watts & Serg. 308 (Pa. 1844) 7

Sibron v. New York, 392 U.S. 40 (1968) 24, 25

Terry v. Ohio, 392 U.S. 1 (1968).....16

United States v. Connolly, 479 F.2d 930 (9th Cir. 1973) 23

United States v. Di Re, 332 U.S. 581 (1948)..... passim

United States v. Watson, 423 U.S. 411 (1976) 29

Vernonia Sch. Dist. 47J v. Acton,
515 U.S. 646 (1995) 3, 4, 6

Wong Sun v. United States, 371 U.S. 471 (1963).....12, 13, 14

Wyoming v. Houghton, 526 U.S. 295 (1999)..... passim

Ybarra v. Illinois, 444 U.S. 85 (1979)..... passim

Statutes

18 U.S.C. § 1001(2) (2002) 26

Md. Code Ann., § 9-501 (2002) 26

Other Authorities

The Abell Foundation, *The Pretrial Release Project: A Study of Maryland's Pretrial Release and Bail System* (Sept. 12, 2001) 23

Douglas L. Colbert, *For Want of a Lawyer, Many Do Time; 60% of Defendants Spend Weeks in Jail, but Never go to Trial*, Baltimore Sun, April 7, 1996.....23

William Cuddihy, *The Fourth Amendment: Origins and Original Meaning* (1990) (unpublished Ph.D. Dissertation, Claremont Graduate School) 6

Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547 (1999) 5, 6, 7

Caitlin Francke, *Police Powers of Arrest Under Study; Judges Favor Shifting Authority to Prosecutors*, Baltimore Sun, December 11, 1998.....23

Wayne R. LaFave, SEARCH AND SEIZURE (3d ed. 1996) ..... passim

Karl I. Moline & Faye S. Taxman, *Pretrial Processing in Baltimore City, MD: A Status Report*, Bureau of Governmental Research (Final Draft, March 2003).....23

INTEREST OF AMICI[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with approximately 400,000 members dedicated to the principles of liberty and equality embodied in the Bill of Rights. The ACLU of Maryland is one of its statewide affiliates. Since its founding in 1920, the ACLU has frequently appeared before this Court, both as direct counsel and as *amicus curiae*. In particular, the ACLU has participated in cases addressing the proper scope of the Fourth Amendment.

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit corporation founded in 1958 to ensure justice and due process for persons accused of crime; to foster integrity, independence, and expertise of the criminal defense bar; and to promote the fair administration of criminal justice. NACDL strives to defend the liberties guaranteed by the Bill of Rights, and is recognized by the American Bar Association as an affiliate organization.

STATEMENT OF THE CASE

On August 7, 1999, at 3:16 a.m., Officer Jeffrey Snyder of the Baltimore County Police Department stopped a car for speeding and for the driver's failure to wear a seatbelt. Inside the vehicle were: Donte Partlow, the driver and owner of the car; respondent Joseph Pringle, who was seated in the front passenger seat; and Otis Smith, who was seated in the backseat. When Partlow opened the glove compartment to retrieve his registration, the officer noticed a large roll of money. After determining that there were no outstanding

---

[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, its members or its counsel made a monetary contribution to the preparation or submission of this brief.

violations or warrants for Partlow, the officer gave Partlow, who was standing outside the vehicle, a verbal warning.

Officer Snyder then asked for and received Partlow's consent to search the car. All three men were frisked, and asked to sit on the curb. The search disclosed $763 from the glove compartment and five glassine plastic baggies containing cocaine that were hidden from view in the backseat armrest. JA 33, 40-41. Officer Snyder questioned the men separately about the drugs and told them that unless he was told who possessed the drugs, "you are all going to get arrested." JA 47. None of the men offered any information regarding the money or drugs, and all were arrested. Two hours later at the police station, respondent confessed to owning the cocaine. Respondent told Officer Snyder that Partlow and Smith did not know or have anything to do with the money or drugs. JA 25. Partlow and Smith were later released.

Respondent was charged with possession of cocaine and with possession with intent to distribute cocaine. The trial court denied his motion to suppress, and the Maryland Court of Special Appeals affirmed. The Maryland Court of Appeals reversed the appellate court's ruling, and held there was no probable cause to arrest respondent. The court explained that the facts did not show that respondent had knowledge and dominion or control over the drugs. Pet. App. 21a. Accordingly, the court held that "a police officer's discovery of money in a closed glove compartment and cocaine concealed behind the rear armrest of a car is insufficient to establish probable cause for an arrest of a front seat passenger, who is not the owner or person in control of the vehicle, for possession of the cocaine." *Id.* at 23a.

This Court granted certiorari to decide the following question: Where drugs and a roll of cash are found in the passenger compartment of a car with multiple occupants, and

all deny ownership of those items, is there probable cause to arrest all occupants of the car?

SUMMARY OF ARGUMENT

"Individualized" or "particularized" suspicion targeting a place, person or thing, is an essential component of probable cause. Probable cause to arrest exists when an officer has an individualized suspicion that singles out a person or persons for arrest. Officer Snyder did not have probable cause to arrest respondent. His testimony reveals that after he found the hidden cocaine, he separately questioned the men to determine who owned the cocaine. After the interrogations failed to identify who owned the cocaine, the officer told the men that unless he was informed about "whose drugs these are," "you are all going to get arrested." JA 45, 47. When this strategy failed, the officer arrested everybody. Although Officer Snyder may have thought that arresting everyone was a neutral response since he could not determine who owned the cocaine, "evenhanded treatment was no substitute for the individualized suspicion requirement." *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 668 (1995) (O'Connor, J., dissenting).

The individualized or particularized suspicion requirement "has a legal pedigree as old as the Fourth Amendment itself." *Id.* at 678 (O'Connor, J., dissenting). During the pre-Revolutionary era, individualized suspicion was an essential ingredient of a lawful search or seizure because without it, officers would have the discretion to intrude at will. Before the Fourth Amendment was ratified, a particularized suspicion requirement was inherent in the operative common-law rule for warrantless arrests. For a felony not committed in his presence, a constable could justify an arrest only upon proof that a "felony in fact" had occurred, and that there was probable cause of suspicion to

think that a particular person, the arrestee, committed the offense.

This Court has also recognized the constitutional status of "individualized probable cause." In most cases, the individualized suspicion requirement is satisfied, and the existence of probable cause turns on other factors. *See, e.g., Illinois v. Gates*, 462 U.S. 213 (1983) (anonymous letter naming suspects and specifying their *modus operandi* for transporting drugs provided particularized suspicion for focusing on suspects). Occasionally, however, probable cause for a search or arrest does not exist due to the absence of individualized suspicion. *See Ybarra v. Illinois*, 444 U.S. 85 (1979); *United States v. Di Re*, 332 U.S. 581 (1948). In these cases, mere presence with others independently suspected of criminality does not, by itself, provide probable cause for a search or arrest. "Where the standard is probable cause, a search or seizure of a person must be supported by probable cause *particularized with respect to that person*." *Ybarra*, 444 U.S. at 91 (emphasis added).

In this case, respondent's mere presence as a passenger in a car that contained hidden drugs did not provide sufficient information to arrest respondent. Respondent made no gestures indicative of criminal conduct, made no furtive movements suggesting an attempt to conceal or destroy contraband, and made no suspicious comments to Officer Snyder. Under these circumstances, a dragnet arrest "was no substitute for the individualized suspicion requirement." *Acton*, 515 U.S. at 668 (O'Connor, J., dissenting).

Petitioner's argument that "when multiple occupants are present in a car containing illegal drugs, a common sense inference can be drawn that any or all of the occupants have knowledge of the drugs in the car," Br. Pet. 17, is unsound for several reasons. First, it ignores the critical fact that the drugs found by Officer Snyder were *not* in the plain view of

the officer or the occupants of the vehicle. Second, petitioner's logic effectively creates a *per se* rule that allows police to arrest everyone on the scene where hidden contraband is found in confined spaces. This rule cannot be limited to automobiles and will adversely impact the liberty and privacy interests of innocent people who are unwittingly present in cars and private premises that contain concealed contraband. Finally, the thrust of petitioner's argument would *sub silento* overrule *Ybarra* and *Di Re*.

Petitioner's position is not supported by the holding – as opposed to the dicta – in *Wyoming v. Houghton*, 526 U.S. 295 (1999). *Houghton* concerned the scope of the "automobile exception," and reaffirms *Di Re*'s controlling principle. Moreover, *Houghton* states that the "traumatic consequences" of a personal search are not to be visited upon a passenger due to his mere presence in a suspected vehicle. *Id.* at 303. If a passenger cannot be subjected to the "traumatic consequences" of a personal search, there is no legal justification for subjecting a passenger to the far greater consequences of an arrest. The judgment below addressed only the lawfulness of respondent's arrest as a mere passenger. Whether probable cause exists to arrest the driver or owner of a vehicle under similar or different facts, is a question the Court need not address in this case.

ARGUMENT

I. INDIVIDUALIZED OR PARTICULARIZED SUSPICION IS AN ESSENTIAL ELEMENT OF PROBABLE CAUSE

Years before James Madison proposed "probable cause" as the quantum of evidence needed for a valid warrant,[2] the colonists and Framers of our Constitution

---

[2] *See* Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 703 (1999) (explaining that "'probable cause' *alone*

recognized that searches and seizures were unreasonable if conducted without particularized or individualized suspicion. During the years leading up to the adoption of the Constitution, the colonists widely denounced intrusions that lacked particularized suspicion. *See* William Cuddihy, *The Fourth Amendment: Origins and Original Meaning* 1402 (1990) (unpublished Ph.D. Dissertation, Claremont Graduate School). These protests demonstrated that "the individualized suspicion requirement has a legal pedigree as old as the Fourth Amendment itself." *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 678 (1995) (O'Connor, J., dissenting). Individualized suspicion was an essential element of a reasonable search or seizure because without a particularized basis for an intrusion, search and seize authority would be left to the discretion of ordinary officers.

The Fourth Amendment reflected the Framers' condemnation of governmental intrusions lacking particularized suspicion. The intrusions that most troubled the Framing generation were broad, suspicionless *searches*. Davies, *supra* at 590 & 601. On the other hand, *arrest* authority was less troubling because common-law rules established strict limits on an officer's power to arrest. "Except for the vicarious concerns over the use of general warrants for arrests in connection with the English Wilkesite cases, which involved both arrests and searches of houses and papers, the pre-Revolutionary controversies were devoid of any consideration of arrest authority." *Id.* at 601. The absence of protest about a constable's warrantless arrest authority is understandable because the "Framers understood that justifications for warrantless arrests and accompanying searches were quite limited," and they "did *not* perceive the

---

was not the common-law standard for criminal warrants; [the] common-law required that arrest or search warrants had to be based on an allegation of an offense or theft 'in fact' as well as 'probable cause of suspicion' as to a *particular person* to be arrested or place to be searched") (emphasis added).

peace officer as possessing any significant *ex officio* discretionary arrest or search authority." *Id.* at 640; *see also*, *id.* at 641 ("The bottom line is that the Framers perceived warrant authority as the salient mode of arrest and search authority."). Indeed, a particularized suspicion requirement was intrinsic to the common-law rules regarding warrantless arrests.

As Professor Thomas Davies explains, the "operative common-law justification for a warrantless arrest" in American law in 1789 was the "felony in fact" rule. Davies, at 632. Under this rule, an officer could justify an arrest "only upon proof that a 'felony in fact' had actually been committed by someone and that there was 'probable cause of suspicion' to think the arrestee was that person." *Id.* at 632. The "felony in fact" rule imposed substantial limitations on arrest authority. *See Id.* at 706 (describing the result in *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807)). Arrests based solely on probable cause were impermissible.[3] Not only did the officer have to know that a "felony in fact" had been committed, but he also needed probable cause of suspicion to think that a particular person – the arrestee – committed the crime.

A. This Court's Precedents Establish That Particularized Suspicion is a Necessary Element of Probable Cause

While the "legal pedigree" of the individualized suspicion requirement is confirmed by historical evidence, *Acton*, 515 U.S. at 678 (O'Connor, J., dissenting), the

---

[3] The authority to arrest on probable cause alone was established in England in 1827, long after the Fourth Amendment had been ratified. *See Beckwith v. Philby*, 108 Eng. Rep. 585 (1827). The "first American reported decisions to endorse the [standalone] probable cause standard for warrantless arrests by officers were the 1844 Pennsylvania decision *Russell v. Shuster*, [8 Watts & Serg. 308 (Pa. 1844)] and the 1850 Massachusetts decision *Rohan v. Sawin*, [59 Mass. (5 Cush.) 281 (1850)]." Davies, at 636-37 (footnotes omitted).

constitutional status of this legal norm has also been recognized by this Court. For half a century, this Court's "probable cause" jurisprudence demonstrates that individualized suspicion is necessary to make a search or seizure reasonable.

1. Probable Cause to Arrest or Search Requires Particularized Suspicion Directed at the Target of the Intrusion

Probable cause exists where police have sufficient information to justify singling out a person or persons for search or seizure. In many of the cases decided by this Court, the individualized suspicion requirement is satisfied, and the existence of probable cause *vel non* turns on other factors. For example, in *Carroll v. United States*, 267 U.S. 132 (1925), federal law enforcement officers had particular reason to focus on "the Carroll boys" because they had offered to sell liquor to the officers on a previous occasion and because shortly after that proposed sale, the officers had observed the suspects heading to Detroit, which the Court assumed to be "one of the most active centers for introducing illegally into this country spirituous liquors for distribution into the interior." *Id.* at 160. The probable cause determination in *Carroll* turned on whether the officers had probable cause to search the suspects' vehicle when, "[t]wo months later these officers suddenly met the same men on their way westward presumably from Detroit." *Id.* Similarly, in *Brinegar v. United States*, 338 U.S. 160 (1949), a federal agent possessed individualized suspicion directed at Brinegar because the agent "had arrested [Brinegar] about five months earlier for illegally transporting liquor; had seen [Brinegar] loading liquor into a car or truck in Joplin, Missouri, on at least two occasions during the preceding six months; and knew [Brinegar] to have a reputation for hauling liquor." *Id.* at 162. The question of probable cause focused on whether the agent had sufficient evidence to search Brinegar's car when he saw the vehicle heading for the Oklahoma border

and it "appeared to be 'heavily loaded' and 'weighted with something.'" *Id.* at 163. Finally, in *Illinois v. Gates*, 462 U.S. 213 (1983), police had particularized suspicion focusing on the Gateses because an anonymous letter had accused them of drug trafficking and specified in detail their *modus operandi*. The existence of probable cause *vel non* turned on whether the police corroboration of the letter's predictions was sufficient to prove the reliability and basis of knowledge of the informant's allegations.

Carroll, *Brinegar*, and *Gates* illustrate the typical probable cause case where police have particularized suspicion for focusing on a specific person or persons. A different (and less frequently seen) type of probable cause case exists where police are investigating a known crime or have information amounting to probable cause of criminality, but lack individualized suspicion for searching or arresting a particular individual or persons. *United States v. Di Re*, 332 U.S. 581 (1948), was the first case to address the meaning of probable cause in these circumstances. In *Di Re*, an informant, Reed, told a federal investigator that he planned to purchase counterfeit gasoline coupons from Buttitta. Accompanied by a Buffalo police detective, the investigator followed Buttitta's car to the identified locale. The officers approached the car and observed Reed in the backseat holding the counterfeit coupons. Reed told the officers that Buttitta had given him the coupons. Buttitta occupied the driver's seat, and Di Re sat next to Buttitta. All three men were arrested. A search of Di Re's person at the police station disclosed one hundred coupons in an envelope concealed between his shirt and underwear.

The government defended the search of Di Re on two grounds. First, the government asserted the search was reasonable because the officers had probable cause to search the car itself. The government asked the Court "to extend the assumed right of car search [announced in *Carroll*] to include the person of occupants because 'common sense demands

that such right exist in a case such as this where the contraband sought is a small article which could easily be concealed on the person.'" *Id.* at 586. The Court rejected this argument stating that Di Re's mere presence in a vehicle suspected of holding contraband did not provide cause to justify a search of *his* person. *Id.* at 587 ("We are not convinced that a person, by mere presence in a suspected car, loses immunities from search of his person to which he would be entitled.").

Alternatively, the government argued that the search of Di Re was justified as incident to a lawful arrest. The government defended the arrest on the theory that Di Re's presence in the car gave the officers probable cause to believe that Di Re was involved in a conspiracy to possess counterfeit coupons. The Court rejected this argument explaining:

> The argument that one who "accompanies a criminal to a crime rendezvous" cannot be assumed to be a bystander, forceful enough in some circumstances, is farfetched when the meeting is not secretive or in a suspicious hide-out but in broad daylight, in plain-sight of passers-by, in a public street of a large city, and where the alleged substantive crime is one which does not necessarily involve any act visibly criminal.... Presumptions of guilt are not lightly to be indulged from mere meetings.

Id. at 593. The Court then noted that "whatever suspicion" might attach to Di Re's "mere presence seems diminished, if not destroyed," *id.* at 594, when Reed failed to implicate Di Re, as he did Buttitta, as part of the conspiracy. "Any inference that everyone on the scene of a crime is a party to it must disappear if the Government informer singles out the guilty person." *Id.*

Decided in the same year as *Di Re*, *Johnson v. United States*, 333 U.S. 10 (1948), addressed the meaning of probable cause in situations where "police are investigating a known crime and obtain information concerning the offender which does not point exclusively to one particular individual." 2 Wayne R. LaFave, SEARCH AND SEIZURE § 3.2 (e) at 60 (3d ed. 1996). In *Johnson*, officers received a tip from a confidential informant that unknown persons were smoking opium at a hotel. When the officers arrived at the hotel, they smelled burning opium and traced the odor to a particular room. After Johnson acquiesced to the officers' entry, they arrested Johnson and discovered incriminating evidence in her room.

This Court first ruled that the entry into Johnson's room was illegal because there was no exigency or other justification for proceeding without a warrant. 333 U.S. at 14-15. The Court then addressed the government's contention that the "search without warrant must be valid because incident to an arrest." *Id.* at 15. This issue required determining whether "a crime [had been] committed in the presence of the arresting officer or for a felony of which he had reasonable cause to believe [Johnson] guilty." *Id.* (footnote omitted). The government argued that once the officers had discovered that Johnson was the only person in the room, they had probable cause to make an arrest. This argument, according to the Court, sought "to justify the arrest by the search and at the same time to justify the search by the arrest." *Id.* at 16-17. The Court found this logic unsound. The constitutional flaw in the government's argument was that the officers "did not have probable cause to arrest [Johnson] until [they] entered her room and found her to be the sole occupant." *Id.* at 16. In other words, while the officers had probable cause to search the room, *id.* at 13, they arrested Johnson before actually finding the opium and thus did not have a particularized suspicion that Johnson possessed opium until *after* her arrest and the search of her room. *See* 2

LaFave, *supra*, § 3.2(e), at 61 (noting that *Johnson* "suggests that probable cause to arrest does not exist unless the information at hand singles out one individual").[4]

Di Re and *Johnson* established that police are not free to arrest or search everyone found at the scene of a crime. *Wong Sun v. United States*, 371 U.S. 471 (1963), reinforced the rulings in *Di Re* and *Johnson* that probable cause of criminality does not justify police practices that amount to dragnet searches or arrests.[5] In *Wong* Sun, an informant told federal narcotics agents that he had recently purchased heroin from "Blackie Toy," who was the owner of a laundry somewhere on Leavenworth Street in San Francisco. The agents arrived at "Oye's Laundry," which was operated by defendant James Wah Toy. After an undercover agent knocked on the door, Toy appeared and opened the door. Toy declined to discuss laundry with the agent and started to close the door when the agent identified himself as a federal narcotics agent. Toy ran away but was eventually captured and arrested.

The "threshold question" in *Wong Sun* was whether the officers could, "on the information which impelled them to act, have procured a warrant for the arrest of Toy." 371 U.S. at 480. The Court ruled that the officers lacked probable cause to arrest Toy:

> The narcotics agents had no basis in experience for confidence in the reliability of [the informant's] information; he had never before given information. And yet they acted upon his imprecise suggestion that a person described only as "Blackie Toy," the proprietor of a laundry somewhere on Leavenworth Street, had sold one ounce of heroin.... For aught that the record discloses, [the informant's] accusation merely invited the officers to roam the length of Leavenworth Street (some 30 blocks) in search of one "Blackie Toy's" laundry – and whether by chance or other means (the record does not say) they came upon petitioner Toy's laundry, which bore not his name over the door, but the unrevealing label "Oye's." Not[hing] ... suggest[s] that the agents had information

---

[4] Petitioner does not cite *Johnson*, but the United States does. *See* Br. U.S. 22, n. 10. The United States suggests that *Johnson*'s holding is irrelevant to this case because the *Johnson* Court "*assumed* that officers lacked probable cause to effect the warrantless arrest of an individual when she answered the door to a hotel room in which the odor of opium had been detected." *Id.* (citation omitted) (emphasis added). This is a curious description of the second issue addressed in *Johnson*, particularly in light of the fact that the government's brief in *Johnson* asked the Court to decide:

> "Whether there was probable cause for the arrest of petitioner for possessing opium prepared for smoking and the search of her room in a hotel incident thereto for the contraband opium, where experienced narcotic agents unmistakably detected and traced the pungent, identifiable odor of burning opium emanating from her room and knew, before they arrested her, that she was the only person in the room."

Johnson, 333 U.S. at 16, n.6.

[5] Prior to *Wong Sun*, the Court never questioned the correctness of its holdings in *Di Re* and *Johnson*. In fact, in *Mallory v. United States*, 354 U.S. 449 (1957), a unanimous Court remarked:

> Presumably, whomever the police arrest they must arrest on "probable cause." It is not the function of the police to arrest, as it were, at large and to use an interrogating process at police headquarters in order to determine whom they should charge before a committing magistrate on "probable cause."

Id. at 456. Of course, petitioner and its *amici* are asking this Court to approve the same procedure that *Mallory* condemned. See Br. Pet. 25 ("By arresting all three, the officer more precisely could determine criminal culpability. Pringle confessed, and the other two were set free."); Br. U.S. 30 (conceding that innocent persons may be arrested, but insisting that arresting all the vehicle's occupants "will facilitate *further investigation* that enables the officer to conclude in short order that a particular passenger should be released") (emphasis added).

> giving them reason to equate "Blackie" Toy and James Wah Toy, or that they had consulted some other kind of official record or list, or had some information of some kind which had narrowed the scope of their search to this *particular* Toy.

Id. at 481 (emphasis added). *Wong Sun* also explained that the Warrant Clause's particularity requirement "applies both to arrest and search warrants." *Id.* at 481, n. 9. Although the agents acted without a warrant, the Court stated that no warrant could have issued had the agents sought one.

> A description of a suspect merely as "Blackie Toy," operator of a laundry somewhere on Leavenworth Street, hardly is information "particularly describing...the person...to be seized." Such information is no better than the wholesale or "dragnet" search warrant, which we have condemned.

Id.

Di Re, *Johnson* and *Wong Sun* involved warrantless searches and arrests. Although car searches and arrests are not controlled by the Warrant Clause, in these cases the Court concluded that the same particularity that is required when police intrude pursuant to a search warrant is also required when police act without a warrant. *Ybarra v. Illinois*, 444 U.S. 85 (1979), involved a valid search warrant of a tavern and a bartender for narcotics. It was argued, *inter alia*, that the existence of a valid warrant eliminated the requirement that police have individualized suspicion with respect to each person subject to search.[6] The Court rejected that argument. The Court reiterated that individualized

[6] *See Ybarra*, 444 U.S. at 107 (Rehnquist, J., dissenting) ("in place of the requirement of 'individualized suspicion' as a guard against arbitrary exercise of authority, we have here the determination of a neutral and detached magistrate that a search was necessary").

suspicion was an essential component of probable cause, and thirty years after *Di Re* was decided, endorsed the principle announced in that case that police may not search or arrest everyone found at the scene of a crime, even when the intrusion may "facilitate further investigati[ve]," Br. U.S. 30, purposes of the police.

Ybarra was a patron of a tavern when the police arrived to execute the warrant. A search of Ybarra revealed narcotics. The Court addressed two issues in *Ybarra* pertinent to this case. First, the Court rejected the claim that the police had probable cause to search Ybarra. Concededly, the warrant permitted a search of the premises and Ybarra was on the premises at the time of the search.

> But, a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person. Where the standard is probable cause, a search or seizure of a person must be supported by probable cause *particularized with respect to that person*. This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be.

444 U.S. at 91 (emphasis added). The Court explained that each patron in the tavern was "clothed with constitutional protection," and that "individualized protection was separate and distinct" from the protection possessed by the owner of the tavern and the bartender. *Id.* Accordingly, the valid warrant to search the premises and the bartender provided the police "no authority whatever to invade the constitutional protections possessed individually by the tavern's customers." *Id.* at 92.

The other issue addressed in *Ybarra* concerned the state's claim that the reasonable suspicion standard of *Terry v. Ohio*, 392 U.S. 1 (1968), should be extended to promote the evidence-gathering function of a search warrant. In an argument reminiscent of the petitioner's position in this case, the State of Illinois urged the Court "to permit evidence searches of persons who, at the commencement of the search, are on 'compact' premises subject to a search warrant, at least where the police have a 'reasonable belief' that such persons 'are connected with' drug trafficking and 'may be concealing or carrying away the contraband.'" *Ybarra*, 444 U.S. at 94. The Court's response was telling: "Over 30 years ago, [we] rejected a similar argument in *United States v. Di Re*." *Id.* at 94. There were obvious differences between *Di Re* and *Ybarra*. For example, the officers in *Di Re* lacked a search warrant, whereas the police in *Ybarra* had one. *Di Re* involved a car and *Ybarra* involved a tavern. Also, the State of Illinois did not concede, as the United States did in *Di Re*, that a valid search warrant for a house would not authorize the search of all persons found in the house. Despite these differences, the *Ybarra* Court concluded that "the governing principle in both cases is basically the same, and we follow that principle today." *Id.* at 95. That principle – controlling in *Di Re*, *Ybarra* and this case – is that probable cause requires sufficient information – particularized suspicion – that justifies singling out the target of the police intrusion.

II. THERE WAS NO PROBABLE CAUSE TO ARREST RESPONDENT ON THE FACTS OF THIS CASE

When all is said and done, the petitioner's argument rests on either of two propositions, neither of which is sustainable. First, petitioner contends there was probable cause to arrest respondent because the facts provided an individualized suspicion to arrest *all* of the occupants of the

car. Second, petitioner appears to be asserting that police may arrest *everyone* inside a car when drugs are found hidden inside the vehicle even absent a particularized suspicion that any one or all the occupants may have known about the drugs. *See* Br. Pet. 25 ("Under the circumstances of the car stop here, unlike the situations in *Di Re* and *Ybarra*, suspicion did not focus on a particular individual to the exclusion of others. Because the drugs were found not on the person of anyone, but behind the armrest within the easy grasp of the three occupants, there was probable cause to arrest [everyone]."). *See also* Br. U.S. 26 ("In this case, consequently, even if the circumstances had led Officer Snyder to believe that one (and only one) of the three passengers could have been associated with the cocaine, he had probable cause to arrest all three and to identify the guilty party through further investigation."). The latter proposition is not sustainable because *Di Re* and *Ybarra* have already established that mere propinquity to *hidden* contraband does not constitute probable cause to justify an arrest or search.

Officer Snyder did not have probable cause to arrest respondent. Although Officer Snyder was investigating a known crime and had probable cause for a further search of the vehicle, he had no individualized basis for arresting respondent. "[Respondent] made no gestures indicative of criminal conduct, made no movements that might suggest an attempt to conceal contraband, and said nothing of a suspicious nature to the police officer[]." *Ybarra*, 444 U.S. at 91. As in *Ybarra* and *Di Re*, Officer Snyder "knew nothing in particular" about respondent, *Id.* at 91, except that he was present, along with two other occupants, in an automobile that the police knew contained illegal drugs. A person's mere presence in a suspected vehicle, however, does not constitute probable cause to search or arrest that individual. "Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with

respect to that person. This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be." *Id.*; *see also Di Re*, 332 U.S. at 587 ("We are not convinced that a person, by mere presence in a suspected car, loses immunities from search of his person to which he would otherwise be entitled."); *id.* at 593 ("presence of Di Re in the car did not authorize an inference of participation" in the conspiracy to justify his arrest). A dragnet arrest "was no substitute for the individualized suspicion requirement." *Acton*, 515 U.S. at 668 (O'Connor, J., dissenting). The definition of "probable cause" stated in *Ybarra* has not changed.

Petitioner insists, however, that "when multiple occupants are present in a car containing illegal drugs, a common sense inference can be drawn that any or all of the occupants have knowledge of the drugs found in the car." Br. Pet. 17. *See also* Br. U.S. 15 ("[T]he presence of drugs – without more – immediately reveals criminal activity.... [T]he discovery of an amount of narcotics suitable for distribution in the passenger compartment supports an inference that all of the car's occupants were aware of, and hence involved with, the drugs."). This argument is flawed for several reasons. First, it ignores the critical fact that the drugs found by Officer Snyder were *not* in the plain view of the occupants of the automobile. Second, the logic of petitioner's position effectively creates a *per se* rule that police discovery of contraband that is *not in plain view* provides probable cause to arrest everyone on the scene. This rule cannot be confined to "car" cases. Finally, the reasoning of *Wyoming v. Houghton* undermines petitioner's argument. *Houghton* states that the "traumatic consequences" of a personal search are not to be visited upon a passenger due to his mere presence in a suspected vehicle. *Houghton*, 526 U.S. at 303. If respondent could not be subjected to the "traumatic

consequences" of a personal search, there is no legal justification for subjecting him to the far greater "traumatic consequences" of an arrest.

A. The Discovery of Drugs Hidden Inside a Vehicle Does Not Provide Probable Cause to Arrest All of the Occupants

It is undisputed that the money and cocaine discovered by Officer Snyder were not in the plain view of the occupants of the vehicle. JA 33, 40-41. Moreover, the ruling below that there was no probable cause to arrest respondent specifically rested on the fact that the money and cocaine were hidden from view. Pet. App. 2a., 22a-23a.

Petitioner's contention that there was, nonetheless, probable cause to arrest respondent simply because he was in a car where drugs were found is contradicted by this Court's holding in *Di Re*. One of the factors relied upon by *Di Re* in rejecting the inference that there was probable cause to arrest Di Re was the fact that "the alleged substantive crime is one which does not necessarily involve any act *visibly* criminal." *Di Re*, 332 U.S. at 593 (emphasis added). Here, "the alleged substantive crime" was not conduct visible to the occupants of the car or Officer Snyder.[7] Furthermore, as in *Di Re*, "[t]here is no evidence . . . that [Officer Snyder] had any

[7] Perhaps in an effort to avoid this aspect of *Di Re*, the United States speculates that the cocaine was somehow, at sometime, visible to everyone in the vehicle, or that Officer Snyder could have made such an inference. See Br. U.S. 17 ("And the discovery of the drugs behind the armrest rather than in a more secreted location suggested that the cocaine had been in *plain view* of the passengers but was hastily lodged between the armrest and the seat during the traffic stop.") (emphasis added); *id.* at 22 ("the possession in a car of a commercial quantity of cocaine 'necessarily involve[s] an[] act *visibly* criminal to passengers who *observe* it.") (emphasis added). There is no support in the record for this conjecture. There was no information available to Officer Snyder at the time of arrest that the cocaine "had been in plain view of the passengers," or that the passengers had "observe[d] it" while inside the vehicle. See JA 33, 40-41.

information indicating that [respondent] was in the car when [the drugs were placed behind the armrest], and none that [respondent] heard or took part in any conversation on the subject." *Di Re*, 332 U.S. at 593.

The Solicitor General's claim that "the presence of drugs – without more – immediately reveals criminal activity," and thus supports "an inference that all of the car's occupants were aware of, and hence involved with, the drugs," Br. U.S. 15 (citation omitted), is unsubstantiated by the record and inconsistent with common experience. Certainly, the innocent graduate student who is offered a ride home by a friend after a late-night party will not search underneath the seat or examine the glove compartment before accepting the ride home. Similarly, the office worker who offers to drive two colleagues to a weekend beach house will not demand the right to search the bags of his invitees before starting the trip. As Justice Powell noted:

> [T]here are countless situations in which individuals are invited as guests into vehicles the contents of which they know nothing about, much less have control over. Similarly, those who invite others into their automobile do not generally search them to determine what they may have on their person; nor do they insist that any handguns [or drugs] be identified and placed within reach of the occupants of the automobile. Indeed, handguns [and drugs] are particularly susceptible to concealment and therefore are less likely than are other objects to be observed by those in an automobile.

County Court of Ulster County v. Allen, 442 U.S. 140, 174 (1979) (Powell, J., dissenting).

As a doctrinal matter, not only does the Solicitor General's proposal contradict the rule of *Di Re*, it also

ignores this Court's repeated warnings that the definition of probable cause and reasonable suspicion should not be reduced to "a neat set of legal rules." *Gates*, at 232; *see also Ornelas v. United States*, 517 U.S. 690, 695-96 (1996). When drugs or contraband are found hidden inside an automobile containing multiple occupants, a more nuanced analysis is required. For example, Professor LaFave concludes that "[w]hen the nature of the ongoing criminal activity is such that its existence is not evident to others in the vicinity, it is then necessary to give careful consideration to those aspects of the extent and nature of the association which may indicate that the associate is also an accomplice." 2 LaFave, *supra* § 3.6(c) at 311 (footnote omitted). Instead of the hard-and-fast rule proposed by the Solicitor General, Professor LaFave reads *Di Re* as "intimat[ing] that when the offense committed by the other person *does* involve an 'act visibly criminal,' then the chances are substantially greater that a companion of the offender is something more than a mere bystander." *Id.* at 313.

Here, the nature of the criminal conduct involved – cocaine possession – was not evident to others on the scene. Officer Snyder was unaware of the drugs until he searched the car. As noted, respondent made no furtive gestures or other suspicious movements. In sum, there were none of the telltale signs of suspicious behavior often observed by police to support the inference that respondent was an accomplice in criminal behavior. *See Id.* at 312, n.108 (listing cases where suspicious conduct of person supported inference that he was involved with the criminality of his traveling companions).

B. Petitioner's Rule Extends Beyond Cars, and Would Effectively Overrule *Ybarra* and *Di Re*

Petitioner's argument cannot be confined to contexts involving multiple occupants of automobiles. Indeed, petitioner recognizes the breadth of its reasoning and invites the Court to endorse the arrest of multiple persons on the scene when police uncover hidden evidence of criminality. *See* Br. Pet. 28-29. For instance, petitioner opines that multiple arrests are lawful when an officer finds drugs "in a motel room occupied by several people." By not limiting his proposed rule in any meaningful way, petitioner is essentially urging this Court to create a new, *per se* rule that police discovery of contraband provides probable cause to arrest everyone on the scene, even when the contraband *is not in plain view*. This rule would effectively overrule both *Ybarra* and *Di Re*.

Petitioner criticizes the ruling below because it "would wreak havoc in other probable cause applications." Br. Pet. 28.[8] The narrow ruling below, however, is consistent with the particularized suspicion requirement mandated by *Di Re* and *Ybarra* which was designed to bar dragnet searches and arrests. A hypothetical illustrates the serious implications of petitioner's argument. Assume Baltimore police come to A's apartment at 3:00 a.m. in response to a noise complaint. A is having a party with 20 friends. After telling A to lower the music, the police obtain A's consent to search the premises for weapons or drugs. An officer lifts a pillow on the couch and discovers a large amount of money and several baggies of cocaine. After A and his friends refuse to talk about the money or drugs, the police arrest everyone. If petitioner's rule is applied to this hypothetical, the discovery of the hidden contraband provides probable cause to arrest everyone on the scene. Under this scenario, several innocent persons will be arrested, and those who are unable to post bail may spend several weeks incarcerated before their case is dismissed or resolved.[9]

Although the discovery of the drugs indicated criminal conduct and may have provided probable cause to *search* the premises, it did not provide authority to *arrest* all 20 of A's friends because "where the standard is probable cause, [an arrest] of a person must be supported by probable cause particularized with respect to that person." *Ybarra*, 444 U.S. at 91. *See also*, *United States v. Connolly*, 479 F.2d 930, 936 (9th Cir. 1973) ("Even certain knowledge that contraband is within a dwelling does not constitute probable cause to arrest whoever happens to be inside."); 2 LaFave,

---

[8] Petitioner offers the hypothetical of four persons sitting at a card-table with a "smoking gun" in the middle of the table and one of the persons slumped over the table (apparently dead or shot) as an illustration of the possible havoc wrought by the ruling below. Petitioner contends that it would be foolish to hold that an officer could only arrest the homeowner or the person closest to the gun. Petitioner's hypothetical is not comparable to facts here. As noted, the court below expressly confined its holding to situations where an officer discovers evidence of criminality or contraband *not* in plain view of the occupants. Pet. App. 2a, 23a. In petitioner's hypo, the gun and dead body are obviously in plain sight of the other persons sitting at the table.

[9] See Karl I. Moline & Faye S. Taxman, *Pretrial Processing in Baltimore City, MD: A Status Report*, Bureau of Governmental Research 5 (Final Draft, March 2003) (reporting that arrestees "*detained to trial* spend an average of 77.9 days incarcerated awaiting trial"). Other studies of Maryland's pretrial process also found that arrestees unable to obtain bail may wait 30 days or longer before their cases are resolved or dismissed. See The Abell Foundation, *The Pretrial Release Project: A Study of Maryland's Pretrial Release and Bail System* 34-35 (Sept. 12, 2001); Caitlin Francke, *Police Powers of Arrest Under Study; Judges Favor Shifting Authority to Prosecutors*, Baltimore Sun, December 11, 1998 at 1B (quoting Baltimore Circuit Administrative Judge Joseph Kaplan: "It's just not right for them to charge people when you can't prove the case and have them sit in jail for a long time."); Douglas L. Colbert, *For Want of a Lawyer, Many Do Time; 60% of Defendants Spend Weeks in Jail, but Never go to Trial*, Baltimore Sun, April 7, 1996 at 6F (noting a study of Baltimore City showing "that nearly 60 percent of defendants' cases were either dismissed or not prosecuted after the defendant spent 47 days in jail").

supra § 3.1(b) at 9 ("probable cause to search a particular place may exist without there also being probable cause to arrest a person who occupies the place.") (citation omitted). If it is unreasonable to arrest all 20 of A's friends, then the arrest of respondent was equally unreasonable. Although the hypothetical envisions arresting 20 people while this case involves only three persons, under petitioner's logic, the arrests are justified in both situations. Both rest on the premise that where drugs are found in a confined spatial context and there is a sufficient personal nexus between the individuals in that space, the circumstances justify an inference that everyone was culpably involved with the drugs. *See* Br. Pet. 22-23 (listing criteria that justified arrest of respondent and the occupants).

Petitioner insists that *Ybarra* is distinguishable from the case *sub judice*. Petitioner asserts that the search in *Ybarra* "was improper because there was no *connection* or *common enterprise* between the bartender and the customer." Br. Pet. 25 (emphasis added). This description misses the point of *Ybarra*'s holding. Certainly, the officers who executed the search warrant "knew nothing in particular about Ybarra, except that he was present, along with several other customers, in a public tavern at a time when the police had reason to believe that the bartender would have heroin for sale." *Ybarra*, 444 U.S. at 91. Assume, however, that Ybarra was conversing with the bartender – instead of "standing by a pinball machine," *id.* at 88 – when the police arrived. That conversation might have demonstrated a "connection" between Ybarra and the bartender, just as the presence of 20 people at A's party established a "connection or common enterprise" between the occupants. Despite such a "connection," *Ybarra*'s citation to *Sibron v. New York*, 392 U.S. 40, 62-63 (1968), unmistakably indicates that the Court would have still found no probable cause to arrest or search Ybarra. As the cite to *Sibron* explains, "[t]he inference that persons who talk to narcotics addicts [over a period of eight

hours] are engaged in the criminal traffic in narcotics is simply not the sort of reasonable inference required to support an intrusion by the police upon an individual's personal security. Nothing resembling probable cause existed [here]." *Id.*

The lack of probable cause in *Ybarra* was not based on the absence of a "connection or common enterprise between the bartender and the customer." The reason there was no probable cause to arrest in *Ybarra* is the same reason there was no probable cause to arrest all of A's friends (in the hypothetical) or respondent in this case: the police lacked an individualized basis for suspecting that the particular arrestees had committed a crime. Mere conversations between Ybarra and the bartender might have established a "connection" between the two, but that would not be enough to justify searching or arresting Ybarra. Likewise, the gathering of 20 people at A's apartment for a party established a "connection or common enterprise" between those persons and premises where police subsequently discovered evidence of crime. But that "connection" does not justify an inference that each was an accomplice to criminal behavior.

The reasoning and result in *Di Re* controls this case. Petitioner and its *amici*, however, suggest that *Di Re* supports their position that the discovery of narcotics in a vehicle provides probable cause to arrest all of the occupants. According to petitioner, *Di Re* involved the "rare situation" where police "have specific information that forecloses a reasonable belief that one of the occupants was guilty, thus negating probable cause to arrest that person," Br. Pet. 24, even though Di Re was present in a vehicle where there was probable cause to search for counterfeit coupons and probable cause to arrest the other occupants. Petitioner also insists that dicta from *Di Re* "recognized that in other circumstances an inference *could* be drawn that one who accompanies another to a criminal enterprise is not an

innocent bystander." *Id.* at 25 (citations omitted). By contrast, the argument continues, respondent's case provided "no such basis for disregarding the inference that all three passengers were aware of the cocaine." Br. U.S. 22.

Petitioner's analysis of *Di Re* is not convincing, and contrary to Professor LaFave's conclusion that *Di Re* "makes it clear that companionship with an offender at the very time of the latter's criminal conduct is not inevitably sufficient to establish probable cause for arrest of the companion. This is particularly true when, as in *Di Re*, it is very possible for the criminal conduct to be occurring without the knowledge of the companion." 2 LaFave, *supra* § 3.6 (c) at 310. Petitioner's analysis of *Di Re*, like its interpretation of *Ybarra*, is mistaken for several reasons. First, the prosecution has the burden of establishing probable cause for a warrantless arrest. *See Beck v. Ohio*, 379 U.S. 89, 97 (1964); *Illinois v. McArthur*, 531 U.S. 326, 328 (2001) (Souter, J., concurring). Thus, respondent had no obligation to bring forth "specific information," Br. Pet. 24, or other evidence to establish a lack of probable cause for his arrest.[10] More importantly, the same factors that caused the *Di Re* Court to find no probable cause to arrest Di Re are present in respondent's case. *Di Re* observed:

[10] The Solicitor General wrongly suggests that it matters to the probable cause determination that "[n]one of [the occupants of the vehicle] acknowledged exclusive ownership of the drugs when questioned by Officer Snyder," nor "did any of them express surprise at the discovery of the drugs." Br. U.S. 22. There are legitimate reasons why a person questioned by the police would not acknowledge or deny ownership of illegal narcotics that were found hidden inside the car he was riding in, or why that person would not express surprise or reveal other emotions in response to an officer's interrogation about illegal narcotics. The Self Incrimination Clause of the Fifth Amendment protects drivers and passengers from incriminating themselves in these situations, and it is a federal crime to make a false statement to a federal law enforcement officer, *see* 18 U.S.C. § 1001(2) (2002), and a crime in Maryland, *see* Md. Code Ann., § 9-501 (2002), to make a false statement to a police officer.

> [A]t the time of the arrest the officers had no information implicating Di Re and no information pointing to possession of any coupons, unless his presence in the car warranted that inference. Of course they had no information hinting further at the knowledge and intent required as elements of the felony under the statute.

332 U.S. at 592. Here, at the time of respondent's arrest, the only information that supported Officer Snyder's inference that respondent knew of the drugs was his presence in the suspected car. Respondent "made no gestures indicative of criminal conduct, made no movements that might suggest an attempt to conceal contraband, and said nothing of a suspicious nature to the police officer[]." *Ybarra*, 444 U.S. at 91. And, as in *Di Re*, Officer Snyder had "no information hinting further at the knowledge and [dominion or control] required as elements of the felony under the [Maryland] statute." 332 U.S. at 592. Officer Snyder's inference that respondent was aware of the drugs turned solely on respondent's presence in the vehicle, the same inference that *Di Re* found insufficient to justify an arrest. *See Id.* at 593 ("[I]f the presence of Di Re in the car did not authorize an inference of participation in the [conspiracy], it fails to support the inference of any felony at all . . . Presumptions of guilt are not lightly to be indulged from mere meetings.").

C. Rulings Since *Di Re* Have Not Undermined the Validity of *Di Re*; Rather, These Rulings Support the Conclusion That, Under the Facts, There Was No Probable Cause to Arrest Respondent

The holdings – as opposed to dicta – in *Wyoming v. Houghton*, 526 U.S. 295 (1999) and *County Court of Ulster County v. Allen*, 442 U.S. 140 (1979), do not support petitioner's position. As petitioner concedes, both of these cases were "decided in contexts other than probable cause to

arrest." Br. Pet 18. *Houghton* concerned whether the automobile exception permits a search of a passenger's purse found inside a car absent individualized suspicion that contraband is in the purse. *Houghton*'s holding was straightforward: "We hold that police officers with probable cause to search a car may inspect passengers' belongings found in the car that are capable of concealing the object of the search." 526 U.S. at 307. To be sure, *Houghton* creates an exception to the "individualized probable cause" requirement for *packages* and *containers* found inside a vehicle. *Id.* at 302. That result was compelled by the unique history of the automobile exception, *id.* at 300-01, which concerns an officer's *search* authority when probable cause exists that a vehicle contains criminal evidence. This case, however, concerns an officer's *arrest* authority, and thus, does not implicate the same law enforcement and diminished privacy interests involved in car searches.

More importantly, rather than undermining "the continuing vitality of *Di Re*," Br. U.S. 7, "*Houghton* actually reaffirms *Di Re*." 3 LaFave, *supra* § 7.2 at 124 (3d ed. 1996) (Pocket Part 2003). *Houghton* specifically distinguishes a search of a passenger's property from a search of the passenger's person, which was invalidated in *Di Re*. The former search is reasonable because of the "reduced expectation of privacy" associated with property found in a vehicle. *Houghton*, 526 U.S. at 303. It is unreasonable, however, to search a passenger's person absent "individualized probable cause." *Id.* at 302. "[T]he degree of intrusiveness upon personal privacy and indeed even personal dignity," makes a search of the person "differ substantially from the package search at issue" in *Houghton*. *Id* at 303. Because *Houghton* distinguished searches of property from the "significantly heightened protection afforded against searches of one's person," *id.*, petitioner wrongly suggests that "[t]he facts and rationale [of *Houghton*] are quite analogous to the issue here of probable

cause to arrest a passenger." Br. Pet 19. If the "traumatic consequences," *Houghton*, 526 U.S. at 303, associated with a personal search are not to be visited upon a passenger due to his "mere presence in a suspected car," *Di Re*, 332 U.S. at 587, the far more "traumatic consequences" inherent in an arrest surely cannot be visited upon a passenger either. *Cf. Atwater v. Lago Vista*, 532 U.S. 318, 364-65 (2001) (O'Connor, J., dissenting); *United States v. Watson*, 423 U.S. 411, 428 (1976) (Powell, J., concurring).

Similarly, *Allen* does not support the arrest of respondent. *Allen* upheld the constitutionality of a statutory presumption, "as applied to the facts of th[at] case," 442 U.S. at 163, that provided that the presence of a firearm in a car is presumptive evidence of its illegal possession by all of the vehicle's occupants. The facts in *Allen* were "tantamount to [a case] in which the guns were lying on the floor or the seat of the car in the *plain view* of the three other occupants of the automobile. In such a case, it is surely rational to infer that each of the [occupants] was fully aware of the presence of the guns and had both the ability and the intent to exercise dominion and control over the weapons." *Id.* at 164-65 (emphasis added). Here, the critical fact is that the money and drugs were *not* in plain view of the occupants or Officer Snyder. Thus, the result in *Allen* does not affect this case. The judgment below addressed only the lawfulness of respondent's arrest as a mere passenger. Whether there might be probable cause to arrest the driver or owner of a vehicle under these circumstances or different facts, is a question the Court need not address in this case. *See Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring); (explaining the Court should not decide "'questions of a constitutional nature unless absolutely necessary to a decision of the case.'") *cf. Alabama v. Shelton*, 535 U.S. 654, 676-77 (2002) (Scalia, J., dissenting).

CONCLUSION

For the reasons stated above, the judgment of the Maryland Court of Appeals should be affirmed.

Respectfully Submitted,

Tracey Maclin
(Counsel of Record)
Boston University School of Law
765 Commonwealth Avenue
Boston, Massachusetts 02215
(617) 353-4688

Steven R. Shapiro
American Civil Liberties Union Foundation
125 Broad Street
New York, New York 10004
(212) 549-2500

Lisa Kemler
Zwerling & Kemler, P.C.
108 North Alfred Street
Alexandria, Virginia 22314
(703) 684-8000

Dated: July 21, 2003

1380
38